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Supreme Court, U.S.
FILED
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CLERK

No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

ELLIOT H. SCHERKER*
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500
Counsel for Respondent

ERIK S. JAFFE*
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
Counsel for Petitioner

* Counsel of Record

PETITION FOR CERTIORARI FILED JULY 5, 2000
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RELEVANT DOCKET ENTRIES

No. 96-cv-2614

U.S. District Court for the Southern District of Florida

No.	Date	Item
1	9/16/96	ORDER TRANSFERRING CASE from District of Columbia.
16	5/7/98	MOTION by Federal Deposit to substitute party defendant.
17	5/11/98	ORDER granting [16-1] motion to substitute party defendant; Jeffey [sic] Beck is substituted as the party defendant.
26	7/27/98	ORDER granting defendant's motion to dismiss [filed in USDC District of Columbia] dismissing case.
29	8/21/98	NOTICE OF APPEAL by Bruce G. Murphy of [26-2] order.

AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE G. MURPHY, pro se,
265 Llwyd's Lane
Vero Beach, Florida 32963-3252
(561) 231-4202

Plaintiff,

v. Civil Action No. 92 1924

FEDERAL DEPOSIT.INSURANCE
CORPORATION, as Receiver for
Southeast Bank, N.A.

Defendant.

AMENDED COMPLAINT

1. This is a civil action brought against the Federal Deposit Insurance Corporation, as receiver (in the possession of a substantial surplus) for Southeast Bank, N.A., and the jurisdiction of this court is founded on 12 U.S.C. § 1819, 15 U.S.C. § 77v, 15 U.S.C. § 78aa, 18 U.S.C.A. § 1965, 28 U.S.C. § 1331, and 28 U.S.C. § 1361.

2. Venue is properly in this judicial district pursuant to 12 U.S.C. § 1821 (d) (6) (A).

3. Plaintiff ("Murphy") is a citizen of the County of Indian River, State of Florida.

4. Defendant Federal Deposit Insurance Corporation ("FDIC") is an agency of the United States Government created under and pursuant to the Federal Deposit Insurance Act

(12 U.S.C. §§ 1811 et seq.), and was and is engaged in the performance of governmental functions in the State of Florida and in Washington, D.C.

5. Southeast Bank, N.A., ("Southeast") was at times herein mentioned a duty organized and existing national banking association with its principal place of business in the City of Miami, County of Dade, State of Florida.

6. On September 19, 1991, the Office of the Comptroller of the Currency declared Southeast insolvent and appointed the FDIC receiver of Southeast.

7. In 1989,. Murphy invested the sum of $515,672.37 in, and became a limited partner in, Orchid Island Associates Limited Partnership ("Orchid").

8. Orchid was the developer of the Orchid Island Golf and Beach Club project ("the Project") located in the Town of Orchid in Indian County, Florida, near Vero Beach. The Project features a golf club, beach club and numerous other amenities along with a variety of luxury residences. The General Partners of Orchid are Robert H. Haines III ("Haines") and Richard-Roberts Co., Inc. ("RR Co."). [Haines and RR Co. are sometimes hereinafter collectively referred to as the General Partners.] As will be set forth hereinafter, by virtue of its actions and involvement with respect to the Project, Southeast became a de facto partner of and joint venturer with Haines and RR Co.

9. Southeast was the acquisition, development and construction lender for the Project. Orchid accepted loans from Southeast to finance the acquisition, development and construction of the Project on or about August 30, 1988, January 26, 1989, April13, 1989, and January 31, 1990, totaling approximately $50 million, which loans are evidenced by loan documents.

10. One of the loans was established as a construction "revolver" which had a cap and was designed such that a portion of revenues from sales would be applied to reduce the

amount outstanding and enable the loan to remain below the cap.

11. Throughout the development and construction process, Southeast, Haines, and RR Co., engaged in fraudulent and wrongful activities which caused great injury, damage, and harm to Murphy.

12. The first phase of the fraud and other wrongdoing that injured Murphy induced Murphy to make his $515,672.37 investment in Orchid.

13. On June 14, 1989, Haines wrote a solicitation letter to Murphy in Virginia. The letter stated that the enclosed projections were prepared by Arthur Andersen & Co. The projections promised a 6.1 multiple return on the investment. The solicitation letter was also accompanied by an offering memorandum outlining an investment offering of Orchid.

14. In making the 6.1 multiple return projection, the solicitation letter falsely implied that there was information that supported the projection, and that Arthur Andersen & Co. had prepared the projection.

15. In fact, unbeknownst to Murphy, there was no such basis for the projection and the projection was entirely speculative, groundless, and contrary to the information then available.

16. Unbeknownst to Murphy, Arthur Andersen Co. had not prepared the projection.

17. The offering memorandum contained a subscription agreement. Paragraph 11 of the subscription agreement provided in part that "It never has been represented, guaranteed, or warranted to me by any representatives of the General Partners, their agents or employees, or any other person, expressly or by implication, as to any of the following:...ii THE PERCENTAGE OF PROFIT AND/OR AMOUNT AND/OR TYPE OF CONSIDERATION, PROFIT OR LOSS...TO BE REALIZED, IF ANY, AS A RESULT OF THIS VENTURE."

18. The contents of Paragraph 11 of the subscription agreement were false in that Haines, a General Partner, had made representations regarding the profit to be realized from the venture.

19. Paragraph 11 was included in the subscription agreement as part of the scheme to defraud in that Paragraph 11 created a sham basis for attempting to escape liability for the false, misleading, and misleading representations made with respect to the Project.

20. Because Paragraph 11 of the subscription agreement conflicted with the 6.1 multiple investment return shown by the projections, Murphy in Virginia placed an interstate telephone call to Anthony F. Dante III in Connecticut, the contact person named in the subscription agreement, on June 19, 1989. That call was returned by an interstate telephone call from Haines in Connecticut to Murphy in Virginia on the same day. Haines instructed Murphy to modify Paragraph 11 of the subscription agreement to reflect Murphy's reliance upon the projections, which Murphy did.

21. Justifiably relying upon the solicitation letter, the projections and Haines' assurances, on August 18, 1989, Murphy transferred the sum of $515,672.37 from one of his accounts in Virginia to William Caldwell, the attorney for Haines, in Vero Beach, Florida, pursuant to Haines' and Caldwell's directions, to fund his subscription agreement of $500,000, and certain utility fees and other costs.

22. The fraudulent representations and activities in connection with the solicitation letter and the offering memorandum were knowingly, intentionally, and/or recklessly made and undertaken, with the intention that Murphy would thereby be induced to invest in Orchid, and they in fact induced Murphy to expend $515,672.37 to invest in Orchid.

23. The benefits of the General Partner's fraud upon Murphy were received in part by Southeast. The proceeds received by Orchid for the sale of one (1) unit to Murphy

were used in part to repay to Southeast the second mortgage encumbering the Project.

24. By letter dated December 1, 1989 from Haines to Murphy in Virginia, Haines acknowledged receiving Murphy's fully executed subscription agreement and corresponding check for a full share unit.

25. Murphy learned in September, 1991 that Arthur Andersen & Co. did not prepare the projections as represented by Haines in behalf of Orchid in the solicitation letter.

26. Upon information and belief, the fraudulent solicitation letter sent by the United States mails to Murphy was also sent by United States mails to some or all of the hundreds of other potential investors. The fact that the fraudulent solicitation letter was sent to others is evidenced by Arthur Andersen & Co.'s letter of July 22, 1989 sent by United States mails which asked Haines to inform any party who received the projections and might become an investor in Orchid to be made aware that the projections were prepared by the management of Orchid and not by Arthur Andersen and Co.

27. The subscription agreement, containing the false, misleading and fraudulent paragraph 11 set forth previously, was sent by United States mails to hundreds of potential investors. Upon information and belief, some but not all of these investors received fraudulent representations regarding the projected 6.1 multiple return.

28. The subscription agreement was fraudulent both as to those potential investors who also received the fraudulent multiple return projections and as to those who did not receive the fraudulent multiple return projections. In the case of those potential investors who also received the fraudulent multiple return projections, Paragraph 11 of the subscription agreement provided a sham defense against liability for fraud. In the case of those potential investors who did not also receive the fraudulent multiple return projections, Paragraph 11 of the subscription agreement created a false and misleading

appearance that Orchid was being promoted in a lawful and legitimate manner.

29. On July 31, 1989, Haines responded by letter via United States mails to Arthur Andersen and Co.'s letter of July 22, 1989 by stating that he had taken the actions described in Arthur Andersen & Co.'s letter of July 22, 1989. In fact, neither of the General Partners nor Southeast ever informed Murphy that the projections were prepared by the management of Orchid and not by Arthur Andersen & Co.

30. Southeast knew, acted recklessly with respect to, and/or should have known of the fraudulent representations and activities set forth above. Southeast's knowledge, recklessness, and/or negligence is evidenced, for example, by the fact that by July 22, 1989, the use of the fraudulent solicitation letter was sufficiently notorious and blatant as to require Arthur Anderson & Co. to formally request Haines to inform anyone who received the projections that Arthur Anderson & Co. did not prepare them. Yet, neither the General Partners nor Southeast took the action Arthur Andersen & Co. requested.

31. Southeast materially participated or aided in the sale of Orchid unit to Murphy and did so, upon information and belief, with knowledge of the wrongdoing of Orchid and the General Partners.

32. Southeast directly or indirectly controlled the General Partners and Orchid.

33. Throughout the development process, with control of the purse strings, Southeast gradually asserted greater and greater control over the Project and the development effort. Among other things, Southeast acted as surety on the Project subdivision improvements performance bonds, Southeast's officers required the Orchid engineer to report to it, Southeast's officers were closely involved with Orchid's employees in the budget formation process, Southeast's officers searched for a participant to complete the Marsh Island transaction,

Southeast's officers conducted monthly review of progress of the Project with its engineer, Southeast's officers responded to limited partner inquiries concerning Orchid, Southeast prepared the Plan for the Orchid Island Golf and Beach Club, Southeast encouraged lot closings prior to completion of the Project's infrastructure and amenities, Southeast became a party to the construction contract with the builder of the Beach Club and cabanas, and Southeast controlled sales prices for lots and Club equity memberships. Southeast's control of the Project further included Southeast's activities in connection with the community development district bond offering.

34. Southeast's involvement and control of the Project and of Orchid was so extensive and complete as to constitute Southeast a de facto partner, co-agent of, and joint venturer with the General Partners and Orchid. for the purposes of the activities alleged herein.

35. Southeast's domination and control of the Project, of Orchid, and of the General Partners was so extensive and complete that, under principles of partnership, joint venture and agency law, and principles of vicarious and respondeat superior liability, Southeast is responsible and liable for the wrongful actions and omissions of the General Partners set forth herein.

36. Before, during, and after the time of Murphy's investment in Orchid, the General Partners have breached their fiduciary obligations to Murphy by engaging in fraud, nondisclosure fraud, constructive fraud, violations of partnership documents, and mismanagement of Orchid.

37. Before, during, and after the time of Murphy's investment in Orchid, Southeast has materially participated in or aided violations of the fiduciary obligations owed to Murphy and has done so, upon information and belief, with knowledge of the wrongdoing of the General Partners.

38. Although sales at the Project began well, eventually sales slowed, and it became necessary for the General Partners, aided by Southeast, to continue and augment their fraudulent and wrongful activities.

39. In order to protect its de facto ownership position and substantial investment in the Project, Southeast deemed it imperative that potential investors and investors not gain access to full and accurate information regarding the past, current, and future condition of the Project.

40. Therefore, Southeast, in order to protect its own investment in the Project, aided, abetted, and participated in .breaches of fiduciary obligations owed to the limited partners by continuing to underwrite and promote the Project and by providing extensive assistance to the General Partners despite Southeast's general awareness of the activities of the General Partners constituting nondisclosure fraud, constructive fraud, violations of partnership documents, and mismanagement of Orchid by the General Partners.

.41. The wrongdoing of the General Partners from about 1988 until about July 1, 1991, have included without limitation wrongful actions and omissions by which Haines and RR Co. have

A. Installed one of Haines' sons, Robert H. Haines IV ("Hutch") as Mayor of the Town of Orchid, then a town having only four developer-related residents, three living in trailers, at a salary of approximately $25,000 a year plus automobile expenses and at the same time allowed Hutch to be a salesman at the Project;

B. Hired an excessive number of employees under the circumstances, many at high salaries, without any regard for reasonable necessity or performance;

C. Failed to timely comply with repayments to Southeast causing Orchid to convey four (4) building lots to Southeast. This conveyance was done under the false and fraudulent pretext that it was a lawful exercise of lender

rights, but in fact Southeast itself had wrongfully contributed to Orchid's problems and had no lawful right to require or accept conveyance of the four lots. In taking these four lots, Southeast misappropriated over $800,000 worth of property as a payoff for its willingness to continue to provide support and assistance to the General Partners despite their continuing wrongdoing.

D. Allowed certain limited partners to execute non-interest bearing promissory notes to Orchid evidencing their obligation for capital contributions subsequent to their initial cash contributions;

E. Allowed Haines and his wife during 1989 to jointly purchase a building lot from Orchid and in connection therewith to execute a note payable to Orchid in the amount of $216,207 bearing only eight (8%) percent interest thereon at a time when Orchid was paying to Southeast prime plus one and one half (1 1/2%) percent, which sum of interest totalled more than eight (8%) percent at all times. It is not known at this time whether Haines and his wife ever repaid the principal or the interest to Orchid.

F. Allowed Haines to owe Orchid an additional $53,793 in connection with the purchase of the building lot without any interest thereon;

G. Caused, as of December 31, 1989, Orchid to pay RR Co. $2,390,323 classified as prepaid (emphasis added) asset management and development fees over and above the sum of $1,512,500 for the year ended December 31, 1989, that Orchid paid RR Co. as an asset management fee. This fee was paid under the false and misleading pretext that it was bona fide, reasonable, legitimate, any customary, when in fact it was excessive, unreasonable, illegitimate, and extraordinary. The General Partners and Southeast wrongfully failed to disclose to Murphy and the

other limited partners to disclose all material facts regarding this fee.

H. Caused a false and misleading appraisal to be generated and used in 1989 valuing the land at $60.5 million when the land had just been purchased the year before for approximately $32,000,000. According to tax records of the Town of Orchid, the taxable value of property in Orchid was only $24,672,000 in 1990, one year after the 1989 inflated appraisal. Moreover, according to the same records, the taxable value of property in Orchid in 1991 was only $49,856,000, still far short of the $60.5 million value claimed in the 1989 appraisal. Among the reasons for generating the inflated land value were 1) it enabled the General Partners and Southeast to create the false and misleading appearance that the Project was solvent and was being properly managed, thereby enabling the General Partners to continue their wrongful activities, 2) using an falsely inflated land value enabled the General Partners to falsely and fraudulently increase their annual management fee, which was two and one half (2 1/2%) percent of the value of the assets of Orchid. The 2 1/2% annual fees was already above the norm in the industry, and unconscionable as well, due to mismanagement of the Project by the General Partners. The excessive fee was further compounded by the fraudulently inflated amount produced by the erroneous appraisal. In addition to the asset management fees, the General Partners have also taken exorbitant development fees, i.e., $1,329,236 for the year ended December 31, 1989. In fact, the General Partners did nothing to earn these development fees, as the development of the Project had been handled by James Anthony, Robert Briggs and Mason Delafield who were paid by Orchid. Further, according to the Private Placement Memorandum, Orchid Island Development Company, not the General Partners, are allowed to take a development fee. The amount of the fee, 8% of total construction costs,

is above the industry standard. The General Partners and Southeast wrongfully failed to disclose to Murphy and the other limited partners all material facts regarding the appraisal, the management fees, and the development fees;

I. Allowed exorbitant syndication costs of $2,775,000 through December 31, 1989, most of which was paid to RR Co.;

J. Caused Orchid to pay RR Co. $1,225,000 and' $50,000 in selling commissions during 1989 and 1988, respectively;

K. Caused Orchid to pay a $1,427,422 premium on April 19, 1989, in connection with Orchid redeeming certain limited partner capital contributions converted in 1988;

L. Required Orchid to pay to RR Co. preferred distributions of $291,000 during 1989 for the period of January 1, 1989 through April 19, 1989. Preferred distributions of $303,176 accrued as of December 31, 1988 were also paid to RR Co. during 1989;

M. Distributed $500,000 during 1989 to a certain limited partner in redemption of that partner's interest in Orchid. No such favored treatment was offered or given to any of the other limited partners. In connection with that transaction, the General Partners elected to increased the basis of Orchid's property by the difference between the limited partner's capital account balance of $416,893 and the $500,00 cash distribution;

N. Paid $993,750 of selling commissions during 1989 to Orchid Island Real Estate Company, Inc. Haines and/or RR Co. own all, or a portion, of Orchid Island Real Estate Company, Inc.;

O. Permitted Haines to charge his condo expenses of $15,702 during 1989 in Vero Beach to Orchid;

P. Paid, on information and belief, hidden somewhere in the financial statements, the costs of owning, operating and maintaining Haines yacht, "Don Quixote", as well as paying its captain and crew; and as well as paying Haines' expenses and costs in connection with Haines' John's Island Club membership;

Q. Failed to render to Orchid timely quarterly financial reports, annual audited reports and K-l's;

R. Paid and lost $50,000 option money belonging to Orchid in connection with Haines' aborted effort to purchase Marsh Island. Further, Haines, in the Marsh Island matter, attempted to charge Orchid a $700,000 commission to be paid to Haines and/or one of his affiliates by Orchid as buyer when it is usual and customary to have the seller pay such a commission;

S. Failed to disclose that in 1989, six (6) New England banks wrote off loans of $2 million apiece to RR Co., or one of its affiliates, with no return on the dollar;

T. Forecasted profit during the marketing of this partnership at six (6) times return of the investment, including a lot, and in April, 1991, reduced the profit forecast to two (2) times the investment, including a lot;

U. Allowed the General Partners to be in violation of Orchid agreement by failing either to infuse Orchid with $10,000,000 or to reduce their stake in Orchid through the sale of additional equity units. Haines has said that he would like to leave $7,000,000 of second mortgage debt in place, leaving him with a larger equity stake and leaving the $7,000,000 debt ahead of the limited partners' equity. The General Partners have failed to reduce or subordinate their fees in light of the reduced profit potential and the extra interest that Orchid is being forced to pay. The excess interest should further offset the General Partners' fees;

V. Failed to subordinate the General Partners' fees to the paydown of the Southeast acquisition and development loan until sometime in the spring of 1991;

W. Used partnership funds to hire the law firm of Beigle & Sandler as a Law firm to defend Haines, rather than as a law firm to protect the interests of the equity partners;

X. Allowed Orchid to pay for the filling, sodding, and irrigation system and watering of Lot 53 which was personally owned by Haines' son, Hutch;

Y. Allowed fill, the transportation thereof having been charged to Orchid, to be deposited on the lot owned by the Smith brothers, long-time friends and business associates of Haines;

Z. Allowed special free memberships without the payment of initiation fees or annual dues to the Orchid Island Gold and Beach Club for certain favored insiders, friends and associates, as well as to his friend and business associate, Robert Foisie, who is neither a lot owner nor a limited partner, as well as allowed other insiders to give to others free membership to the club without the payment of initiation fees or annual dues. Furthermore, Haines allowed his good friends and business associates, the Smith brothers, to have two (2) club memberships and/or club charging privileges when they received only one (1) lot, entitling them to only one membership;

AA. Permitted Haines's son, Hutch, to entertain his young friends, who were not bona fide prospects, for golf and for meals and drinks at the beach club at the expense of Orchid, as well as other insiders, their wives and their guests the same privileges at the expense of Orchid. Further, Hutch, who is not a paid member of the club, played golf regularly at the club, without paying any cart fees. Furthermore, Hutch lived rem fee at the Project from 1989 through part of 1991;

AB. Taken an unsecured note from an insider, Mason Delafield, in connection with the purchase of a lot;

AC. Given approximately a $90,000 discount on a lot sold to Robert Briggs, an insider;

AD. Allowed excessive cost over-runs on the Project and generally mismanaged the Project;

AE. Allowed the Southeast Bank loan to be in default as of June 1, 1991, and failed to date to cure that default;

AF. Engaged in conduct and activities calculated to erode or eliminate the equity investments of Murphy in the Project, as well as about forty (40) other limited partners, said investments totalling about $15 million dollars, or more; and

AG. Paid the former chief salesman of the Project, Mason Delafield, a salary of $200,000 per year, plus automobile allowance, without any regard for sales performance.

42. Despite Southeast's general awareness of many or all of the foregoing wrongful activities, Southeast failed to make full disclosure of all material facts to Murphy and the other limited partners and instead participated in and aided the wrongdoing of the General Partners by continuing to finance the Project and to fund the wrongful activities of the General Partners.

43. Southeast wrongfully benefited from the wrongdoing of the General Partners in that Southeast's received funds from the Project which it would not have received but for the wrongdoing activities of the General Partners.

44. Murphy's fraudulently procured investment in Orchid and in the Project, his false impression that Orchid and the Project were and remained viable, his continuing lack of knowledge about the wrongdoing perpetrated against him, and the injuries suffered by Murphy, were proximate results

of Southeast's aiding, abetting and participation in the wrongdoing set forth above.

45. In 1991, revenue from sales of lots and Club memberships became insufficient to meet Orchid's repayment obligations under the loan documents and to reduce the construction revolver loan. In response, Southeast acting as a partner, co-agent, and joint venturer of and with Orchid's General Partners assumed the obligation to act as agent and fiduciary for Orchid Island and its general and limited partners in establishing a Community Development District and orchestrating a public bond offering to raise funds for the development, which funds would be used to satisfy the indebtedness to Southeast and secure additional necessary funding for the completion of the project.

46. Southeast acted as agent of and fiduciary for Orchid and its general and limited partners by taking actions to determine the feasibility of the bond offering, choosing bond counsel, participating in and/or drafting the Master Trust indenture for the Orchid Island Community Development District, selecting the engineer, town council, and consultant and installing itself as part of the Town of Orchid Special Assessment Financing Group.

47. Southeast's conduct constituted total dominion over the development such as to deprive Orchid of its own will, rendered Orchid subservient to the interests and directions of Southeast, and established an independent legal obligation owed by Southeast to Orchid and Murphy arising separate and apart from the loan documents.

48. Southeast assumed the role and duties of a fiduciary of and agent for Orchid, and its general and limited partners, including Murphy, and additionally owed a duty of reasonable care to them.

49. Under the bond financing scheme devised by Southeast, Orchid would establish a community development district and engage in a public bond offering to raise funds. As

designed by Southeast, Orchid would take a "bridge" loan from Southeast, and various of the principals of Orchid would similarly take additional loans from Southeast, to carry the Project until the bond offering was complete. The proceeds from the bond offering, according to Southeast, would not only repay each of these loans but would be applied to reduce the outstanding balance with Southeast. In addition, Southeast repeatedly represented to Orchid and its general and limited partners that if Orchid undertook the bond financing, Southeast would add $4 million to Orchid's construction revolver loan, funds which Southeast knew Orchid desperately needed to complete the construction of the Project's infrastructure and amenities.

50. Having devised this plan, Southeast then controlled its implementation. Southeast's corporate finance department performed all the necessary calculations and feasibility studies, and Southeast retained the underwriters and arranged for bond counsel. In less than three months time, all arrangements were complete, investors had been lined up and the offering was set to occur.

51. In the course of its bond financing activities, Southeast expressly and/or impliedly represented to Orchid and its general and limited partners that the bond financing scheme devised by Southeast was a viable financing arrangement and that Southeast had made all the necessary arrangements to render such financing feasible.

52. Upon information and belief, Southeast repeatedly caused the United States mails to be used in furtherance of its false, misleading, and fraudulent bond financing scheme.

53. On the eve of the offering, Southeast announced for the first time that it needed to discuss the bond transaction with the several lenders who had collectively participated in the Orchid loans, and to obtain their approval. As structured, the bond financing would have resulted in a lien on the Project superior to that of the participants, at which the latter re-

jected the bond offering. Southeast then called a halt to the entire transaction.

54. At no time prior to Southeast's termination of the bond financing scheme did Southeast disclose to Orchid and its general and limited partners that the bond transaction required the approval of several other lenders, and this requirement was contrary to the representations and assurances that Southeast expressly and/or impliedly made to Orchid and its general and limited partners.

55. As a direct result of Southeast's involvement in soliciting community development district participants on behalf of Orchid and conducting a public bond offering, and as a direct result of the false, misleading, and fraudulent representations and assurances of Southeast, Orchid and its general and limited partners imposed trust and confidence in Southeast, relied on the actions and representations of Southeast, and forebore from refinancing or seeking additional financing for the project, all to the great injury and determine of Orchid and its general and limited partners.

56. Southeast knew, at the time it devised the community development district bond offering plan, that its participants' awareness and approval of the proposed bond offering was required, but failed to disclose this requirement to Orchid and its general and limited partners. Instead, Southeast induced Orchid and its general and limited partners to take an additional loan in connection with the bond offering by representing to them that the proceeds of the offering would be more than sufficient to repay not only that loan but a portion of the previous indebtedness and by assuring them of an increase in Orchid's construction revolver account. These omissions and representations were material to the decision of Orchid and its general and limited partners to take the additional loan and expend other resources in connection with the bond offering, and were material to the decision of the general and limited partners to forebear from obtaining other financing.

57. Southeast's failure to inform Orchid and its general and limited partners, including Murphy, of the requirement of the participants' approval, and Southeast's representations as to the benefits of the bond offering, were false when made, were known to Southeast to be false and were made by Southeast with the intention of inducing Orchid and its general and limited partners to undertake the additional loan and to forebear from obtaining other financing.

58. Orchid and its general and limited partners reasonably relied upon Southeast's omissions and misrepresentation by taking the additional loan, by expending additional resources in connection with the bond offering, and by forebearing from obtaining other financing.

59. The scuttled bond offering undermined the economic viability of the Project. Having taken additional loans and expended resources in reliance up on Southeast's assurances regarding the bond financing proceeds and construction revolver increase, and receiving absolutely nothing in return, Orchid's position deteriorates. Ten days after undermining the financing effort it had devised and implemented, Southeast turned around and placed Orchid in default under its various loan and security documents.

60. On August 2, 1991, Southeast filed an action to foreclose the acquisition and development mortgages on the real property, fixtures and improvements of the Project, and to exercise the rights of a secured party under pledge agreements and security instruments in intangible and tangible personal properties. Murphy's investment in Orchid is now worthless.

61. On or about September 19, 1991, Southeast was declared insolvent and taken over by the FDIC as Receiver. The FDIC then sold the Southeast loans on the project to First Union National Bank of Florida, N.A. ("First Union").

62. On or about May 27, 1993, First Union sold the project at a foreclosure sale.

63. The FDIC, as Receiver for Southeast, is in possession of a large surplus.

64. At all relevant times herein, on information and belief, Southeast failed to require Orchid and the General Partners to submit to Southeast regular and timely detailed financial statements and reports or Orchid, failed to audit the books of Orchid, failed to follow the terms and condition of the loan documents, failed to properly monitor, fully discover and correct the conduct and activities of the General Partners outlined in this Complaint, failed to keep the participating banks and participant USX Corporation advised of the fact and status of the bond proposal by the Town of Orchid to create a special taxing district to make assessments for the completion of the infrastructure of the Project and thus causing the bond proposal to fail and in turn causing the Project to fail, and on information and belief, Southeast has exceeded its legal lending limits in connection with the Project, failed to properly apply the loan proceeds and otherwise negligently administered the loan, all of which caused Murphy to lose his investment.

65. Because Southeast devised the bond financing scheme, determined its feasibility, performed the necessary calculations and undertook its implementation, Southeast's obligations to Orchid with respect to such financing were memorialized in substantial documentation from Orchid and letters from Orchid's counsel alerting Southeast to its failed responsibilities in connection with the bond offering. All such documentation, and Orchid's claims based upon Southeast's misconduct, were thus readily apparent on the face of Southeast's files and were manifested to the Federal Deposit Insurance Corporation prior to the takeover of Southeast.

66. In December, 1991, Murphy duly and timely filed a proof of claim in the sum of $602,031.54 with the FDIC.

67. On June 23, 1992, the FDIC determined that Murphy's claim should be entirely disallowed, as evidenced by Exhibit A.

68. To date, Murphy has received no return on his investment in Orchid and has received no part of the capital he invested in Orchid.

COUNT I
(DECLARATORY RELIEF)

69. Murphy repeats and realleges Paragraphs 1 through 68 above as if fully set forth herein and further states as follows.

70. As of June 23, 1992, the FDIC did not agree to the review of its determination in an administrative hearing pursuant to 12 U.S.C. § 1821(d) (7)(A).

71. As of June 23, 1992, the FDIC has failed to establish other alternative dispute resolution procedures as required by 12 U.S.C. § 1821(d)(7)(b).

72. There is an actual controversy between Murphy and the FDIC regarding the FDIC's failure to establish other review resolution procedures and Murphy is entitled to a declaratory judgment declaring that the FDIC must forthwith establish other alternative dispute resolution procedures, and offer the same to Murphy.

WHEREFORE, Murphy requests that the Court enter a declaratory judgment declaring that the FDIC shall forthwith establish other alternative dispute resolution procedures as required by 12 U.S.C. § 1821(d)(7)(B), and offer the same to Murphy, and further requests that the Court grant such other and further relief as deemed proper.

COUNT II
(MANDAMUS)

73. Murphy repeats and realleges Paragraphs 1 through 72 above as if fully set forth herein and further states as follows.

74. The FDIC has a duty to establish other alternative dispute resolution procedures pursuant to 12 U.S.C. § 1821(d)(7)(b).

75. As of June 23, 1992, the FDIC has failed to perform the aforesaid duty owed to Murphy.

WHEREFORE, Murphy requests. that the Court compel the FDIC establish alternative dispute resolution procedures within such time as may be fixed by the Court, and order the FDIC to offer such alternative dispute resolution procedures to Murphy within thirty (30) days of the establishment of such procedures.

COUNT III

(FAILURE TO REGISTER SECURITIES)

76. Murphy repeats and realleges Paragraphs 1 through 75 above as if fully set forth herein and further states as follows.

77. That partnership units in Orchid are securities for the purposes of both the Virginia Securities Act, the Florida Securities and Investor Protection Act, and the federal Securities Act of 1933 and the Securities Exchange Act of 1934, to-wit: Investment Contracts. The limited partnership interests and the acts complained of in this complaint involved the purchase and sale of securities by means of written and oral communications, by use of the mails, and by use of the means and instrumentalities of interstate commerce.

78. That partnership units in Orchid are not, and never have been, registered under the Securities Registration provisions of the Virginia Securities Act, and are not and never have been registered with the Securities and Exchange Commission as required by Section 5 of the Securities Act of 1933 and, therefore, were offered and sold by defendants in violation of Section 12(1) of the Securities Act of 1933. This is not the first time that Haines and RR Co. have violated securities laws or rules. During the offering period, both Haines and RR Co. failed to disclose to prospective purchasers of

Orchid units that on April 10, 1989, the State of Illinois issued a Notice of Hearing to determine whether an order of revocation, suspension or censure should be imposed against Richard Roberts Capital Corp., a subsidiary of RR Co. The allegations were that the respondent failed to timely file required financial documents with the Secretary of State. A hearing date was set for June 28, 1989; docket/Case No. H8900238, dated March 29, 1989. On May 23, 1989, by means of a stipulation, Illinois entered into a Consent Order against Richard Roberts Capital Corp. The findings of fact and conclusions of law were that respondent failed to timely file a required financial document with the Secretary of State thereby violating § 12.D of the Illinois Securities Law of 1953, as amended. A fine of $500 was assessed against the respondent.

79. As a result, Murphy has suffered hundreds of thousand of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for rescission and/or damages, including attorneys' fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT IV

(UNLAWFUL OFFER AND SALE OF SECURITIES

80. Murphy repeats and realleges Paragraphs 1 through 79 above as if fully set forth herein and further states as follows.

81. The solicitation letter and the projections used by Orchid, the General Partners, and Southeast in offering or selling securities to Murphy, directly or indirectly, violated both the Unlawful Offers and Sales Provisions of the Virginia Securities Act and the Florida Securities and Investor Protection Act.

82. The solicitation letter, the projections, and the representations and assurances used by Orchid, the General Partners, and Southeast, in offering or selling securities to Mur-

phy and others, involved and constituted the employment of a device, scheme, or artifice to defraud, the making of untrue statements and omissions of statements of material facts (including the making of such statements and omissions by means of a prospectus or oral communication), and the engaging in acts, practices, or course of business that were fraudulent and deceitful, all in violation of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)], Rule 10b-5 of the Securities and Exchange Commission, and Section 12(2) of the Securities Act of 1933.

83. Southeast is liable to Murphy for the violations of securities laws in that Southeast participated as a principal in those violations and for the further reason that Southeast acted as the partner, co-agent, controlling person (within the meaning of Section 20(a) of the Securities Exchange Act of 1934), and/or joint venturer of and with the General Partners.

84. As a proximate result of the violations of securities laws, Murphy has suffered hundreds of thousands of dollars damages.

WHEREFORE, Murphy demands judgment against the Defendant for rescission and/or damages, including attorneys' fees, interest, costs and such other and further relief as the court deems just and proper.

COUNT V

(BREACH OF FIDUCIARY DUTIES)

85. Murphy repeats and realleges Paragraphs 1 through 84 above as if fully set forth herein and further states as follows.

86. By their actions and omissions set forth herein, Southeast and the General Partners of Orchid breached the fiduciary obligations owed to Murphy.

87. By its actions and omissions set forth herein, Southeast knowingly participated in the General Partners' breaches of fiduciary obligations owed to Murphy.

88. The General Partners and Southeast are accountable to Murphy and to the other limited partners as fiduciaries. The General Partners and Southeast breached their fiduciary duties to Murphy and the other limited partners, failed to make full disclosure of all material facts, and failed to exercise good faith, reasonable business judgment, and integrity in handling Orchid affairs.

89. Under the circumstances set forth herein, Southeast owed a fiduciary obligation to Orchid and its general and limited partners, including Murphy. The fiduciary obligation owed by Southeast existed independently and separate and distinct from the loan documents.

90. Additionally and/or alternatively, even if Southeast itself did not owe fiduciary obligations to Murphy, Southeast is nevertheless liable for the General Partners breaches of fiduciary obligations owed to Murphy in that Southeast knowingly participated in those breaches of obligations.

91. As a direct and proximate result of Southeast's breaches of fiduciary obligations and of Southeast's participation in the General Partners breaches of fiduciary obligations owed to Murphy, Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, including attorney's fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT VI

(BREACH OF CONTRACT)

92. Murphy repeats and realleges Paragraphs 1 through 91 above as if fully set forth herein and further states as follows.

93. In August, 1989, for valuable consideration, Murphy, Orchid and Southeast entered into an investment contract

whereby Murphy was to be paid certain monetary sums annually in accordance with the projections.

94. Murphy has not been paid any sums due under the contract, all of which are justly due and owing to Murphy under the contract.

95. As a result, Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, including attorneys' fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT VII

(ACCOUNTING)

96. Murphy repeats and realleges Paragraphs 1 through 95 above as if fully set forth herein and further states as follows.

97. ARTICLE V, BOOKS AND RECORDS, 5.1 Accounting of the Second and Restated Limited Partnership, dated April 30, 1989, provides in part that the Orchid Island Partnership books and records shall be audited annually by a certified public accountant and that Orchid shall furnish an audit report to each limited partner annually within 120 days of the end of each calendar year; that the General Partners shall, within 45 days following the end of each quarter of the fiscal year, furnish each limited partner with an unaudited report; and, in addition, that not later than March 15th of every year, the General Partners shall furnish each limited partner with a copy of federal form 1065 (K-1) .

98. Murphy has not been furnished an audit report for 1990 and 1991, unaudited quarterly report for 1991, or a K-1 for 1990 or 1991.

WHEREFORE, Murphy demands judgment that the Defendant be compelled to furnish the required accounting to

Murphy and such other and further relief as the Court deems just and proper.

COUNT VIII

(FRAUD)

99. Murphy repeats and realleges Paragraphs 1 through 98 above as if fully set forth herein and further states as follows.

100. By their actions and omissions set forth herein, the General Partners perpetrated a fraud upon Murphy that induced him to invest in Orchid and the project, and further induced Murphy to continue his participation in Orchid and the project by means of the further fraud, nondisclosure fraud, constructive fraud, and negligent misrepresentations described herein.

101. Southeast is liable for the fraudulent activities of the General Partners in that Southeast:

A. knowingly participated in the wrongful activities of the General Partners;

B. knew that the General Partners' conduct constituted a breach of duties owed by the General Partners and gave substantial assistance and encouragement to the General Partners in their conduct;

C. acted as the co-agent, partner, and joint venturer of the General Partners;

D. is liable for the fraudulent activities of the General Partners under principles of partnership, joint venture and agency law, and principles of vicarious and respondeat superior liability.

102. As a proximate result of the fraud, nondisclosure fraud, and constructive fraud set forth herein, Murphy has suffered several million dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other and further relied as the Court deems just and proper.

COUNT IX

RICO VIOLATIONS

103. Murphy repeats and realleges Paragraphs 1 through 102 above as if fully set forth herein and further states as follows.

104. By their activities set forth herein, Southeast and the General Partners engaged and participated in conduct in violation of federal and state laws, to wit: mail fraud indictable under 18 U.S.C. § 1341; wire fraud indictable under 18 U.S.C. § 1343; fraud in the sale of securities punishable under United States laws, and commercial bribe receiving and commercial bribery chargeable under state law, Fla. Stat. Ann. § 838.15 and 838.16 (West 1994), and punishable by imprisonment for more than one year.

105. Southeast and the General Partners participated in, aided and abetted, and conspired to commit, activities in violation of Section 1962 of Title 18 of the United States Code.

106. Orchid constituted an "enterprise" [hereinafter the "Enterprise"] within the meaning of that term as used in 18 U.S.C. §§ 1961 et seq.

107. Additionally and/or alternatively, at all times relevant hereto, Southeast and the General Partners associated together to form an ongoing, informal organization for the purposes of carrying out the wrongful activities set forth herein and for the purpose of carrying out the Project, and have thus constituted an association-in-fact "enterprise" within the meaning of that term as used in 18 U.S.C. §§ 1961 et seq.

108. As used herein, the term "Enterprise" shall refer to Orchid and/or to the association-in-fact enterprise consisting of the association of Southeast and the General Partners.

109. Each Enterprise had and has continuity of personnel, with the persons employed by or associated with the Enterprise performing particular functions and possessing certain authority within the organization.

110. In accordance with the organizational structure of each Enterprise, the persons associated therewith at times performed designated lawful functions. At other relevant times, however, certain persons associated with each Enterprise, including the General Partners and Southeast, used and abused each Enterprise in furtherance of the fraudulent, illegal and wrongful activities alleged herein.

111. The nature, organization, structure and activities of each Enterprise were such that it had an existence distinct from any one member of the Enterprise or from any individual person or entity employed by or associated with the Enterprise, and distinct from the pattern of racketeering activity engaged in by Southeast and the General Partners.

112. Each Enterprise functioned continuously during the relevant time period, and continues to function.

113. At all times relevant to this action and currently, each Enterprise constituted an enterprise as defined in 18 U.S.C. § 1961(4) which was and is engaged in and whose activities affected and affect interstate and foreign commerce in ways which include, without limitation, the following:

A. the acts of mail fraud and wire fraud described herein involving transmission of messages by United States interstate wire facilities and United States mail facilities;

B. the operation of the Enterprise involving transfers of money and property across state lines from and to the Enterprise, customers and suppliers, Southeast, and others, and to and from banks and other financial institutions.

114. At all times relevant to this action, Southeast and the General Partners each was and each still is a "person" within the meaning of 18 U.S.C. § 1961 et seq.

115. During the relevant times, in connection with the activities giving rise to this action, Southeast and the General Partners conspired with each other, and with others, to engage in, and did engage in, the various activities set forth herein and aided and abetted one another in these activities, all as proscribed and prohibited by 18 U.S.C. §§ 2, 1341, 1343, 1962(a-d), federal securities laws including 15 U.S.C. § 78j(b) and SEC Rule l0b-5, and Fla. Stat. Ann. § 838.15 and 838.16 (West 1994).

116. During the relevant times and in the furtherance of and for the purpose of executing the schemes and artifices to defraud alleged herein, Southeast and the General Partners on numerous occasions used and caused to be used the mail depositories of the United States Postal Service by both placing and causing to be placed mailable matter in said depositories and by removing and causing to be removed mailable matter from said depositories, each such use of the mails in connection with the scheme and artifice to defraud and to obtain money by means of false pretenses, constituting the offense of mail fraud as proscribed and prohibited by 18 U.S.C. § 1341. In furtherance of the fraudulent schemes set forth herein, the General Partners and Southeast caused uses of the United States mails which included without limitation the following:

A. On or about June 14, 1989, Haines sent the false, misleading, and fraudulent solicitation letter to Murphy via United States mail;

B. Upon information and belief, Haines and/or RR Co. sent similar solicitation letters to other potential and actual investors via United States mail;

C. On or about June 14, 1989, Haines sent the offering memorandum and the subscription agreement containing the false, misleading and fraudulent Paragraph 11 to Murphy via United States mail;

D. Upon information and belief, the offering memorandum and the subscription agreement containing the

false, misleading and fraudulent Paragraph 11 were sent from about 1988 through about 1990 by the General Partners via United States mail to other potential and actual investors;

E. On or about July 22, 1989, Arthur Andersen & Co. sent by United States mails a letter which asked Haines to inform any party who received the projections and might become an investor in Orchid to be made aware that the projections were prepared by the management of Orchid and not by Arthur Andersen and Co.

F. On July 31, 1989, Haines responded by letter via United States mails to Arthur Andersen and Co.'s letter of July 22, 1989 by stating that he had taken the actions described in Arthur Andersen & Co.'s letter of July 22, 1989.

G. Upon information and belief, the General Partners and Southeast caused the United States mails to be used in furtherance of the fraudulent asset management fees scheme described in Paragraph 41(G) above.

H. Upon information and belief, the General Partners and Southeast caused the United States mails to be used in furtherance of the fraudulent appraisal scheme described in Paragraph 41(H) above.

I. The General Partners and Southeast caused the United States mails to be used to disseminate the false, misleading, and fraudulent profit forecasts described in Paragraph 41(T) above.

J. At, for the most part, regular monthly intervals from 1988 to 1991, Southeast and the General Partners have caused to be placed into authorized depositories of the United States mail items, including financial statements and summaries of financial information, for delivery in furtherance of their schemes to defraud set forth herein and to perpetuate their ownership and control of the Project. The financial information did not accurately

reflect the financial condition of Orchid and of the Project, failed to disclose material facts, and suppressed and concealed the true financial condition of Orchid and the Project.

K. Southeast and the General Partners knowingly and intentionally failed to disclose material facts. Their deliberate misrepresentations and nondisclosures of material facts in conjunction with the financial information sent to Murphy through the United States mails constituted repeated violations of 18 U.S.C. § 1341 relating to mail fraud.

L. Upon information and belief, the General Partner and Southeast caused the United States mails to be used accomplish many of the other activities set forth herein. Murphy lacks complete information regarding the uses of the mails in furtherance of the wrongful activities set forth herein at the present time inasmuch as additional information is in the possession and control of the General Partners and other persons and entities.

117. During the relevant times, and in furtherance of and for the purpose of executing the schemes and artifices to defraud set forth herein, Southeast Bank and the General Partners, on numerous occasions, used and caused to be used interstate wire communications in interstate commerce, by making and causing to be made interstate telephone calls and other interstate wire communications as proscribed and prohibited by 18 U.S.C. § 1343. In furtherance of the fraudulent schemes set forth herein, the General Partners and Southeast caused uses of interstate wire communications which included without limitation the following:

A. On June 19, 1989, telephone calls were placed by means of interstate wire communication facilities between Murphy in Virginia and Anthony F. Dante III in Connecticut, and between Haines in Connecticut and Murphy in Virginia on June 19, 1989, as set forth in Paragraph 20.

B. Upon information and belief, the fraudulent misrepresentations made by Haines to Murphy via interstate telephone call were also made to other potential and actual investors.

C. On August 18, 1989, Murphy transferred, by means of interstate wire facilities, the sum of $515,672.37 from one of his accounts in Virginia to William Caldwell, the attorney for Haines, in Vero Beach, Florida, pursuant to Haines' and Caldwell's directions, to fund his subscription agreement of $500,000, and certain utility fees and other costs.

D. Upon information and belief, the General Partners and Southeast caused interstate wire communication facilities to be used accomplish many of the other activities set forth herein. Murphy lacks complete information regarding the uses of interstate wire communication facilities in furtherance of the wrongful activities set forth herein at the present time inasmuch as additional information is in the possession and control of the General Partners and other persons and entities.

118. Southeast and the General Partners violated Fla. Stat. Ann. § 838.15 and 838.16 (West 1994) in that Southeast and the General Partners each:

A. solicited, accepted, or agreed to accept benefits with the intent to violate a statutory or common law duty to which the person or entity receiving the benefits was subject as an agent or employee of another, as a fiduciary, and as an officer, director, partner, manager, or other participant in the affairs of an organization. Southeast received, for example, what was in effect a commercial bribe when it accepted the four lots as set forth in Paragraph 41(A). When the General Partners failed to timely comply with repayments to Southeast, Southeast and the General Partners caused Orchid to convey four (4) building lots to Southeast. This conveyance was done under

the false and fraudulent pretext that it was a lawful exercise of lender rights, but in fact Southeast itself had wrongfully contributed to Orchid's problems and had no lawful right to require or accept conveyance of the four lots. In taking these four lots, Southeast misappropriated over $800,000 worth of property as a payoff for its willingness to continue to provide support and assistance to the General Partners despite their continuing wrongdoing. Similarly, the General Partners accepted benefits from the Project in violation of its duties, as previously set forth.

B. knowing that another was subject to the duty described in Paragraph 118(A) and with intent to influence the other to violate that duty, conferred, offered to confer, or agreed to confer a benefit on the other. The General Partners, for example, paid what was in effect a commercial bribe to Southeast when the General Partners allowed Southeast to misappropriate from Orchid the four lots referred to in Paragraph 118(B). Southeast, for example, paid what was in effect a commercial bribe to the General Partners when, despite Southeast's domination and control of the Project, Southeast allowed the General Partners to receive the improper benefits referred to in Paragraph 41 above.

119. By their activities set forth herein, Southeast and the General Partners violated federal securities laws, including 15 U.S.C. § 78j(b) and SEC Rule l0b-5.

120. The acts of mail fraud, wire fraud, securities fraud, and commercial bribery constituted acts of "racketeering activity" within the meaning of that term as used in 18 U.S.C. § 1961(1), and are sometimes also referred to herein collectively as the "racketeering activity" and the "pattern of racketeering activity."

121. The racketeering activity occurred repeatedly, continuously, and without interruption from the time of their first

occurrence during or prior to 1988 and continued thereafter until at least 1991.

122. The acts of racketeering activity alleged above have sufficient continuity and relationship to constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. §§ 1961 et seq.

123. Additional information regarding the complete scope of the racketeering activities of Southeast and of the General Partners is not presently available to Murphy, and such information is controlled by the FDIC, as Receiver for Southeast, and the General Partners, and others.

124. Southeast and the General Partners were each employed by or associated with each Enterprise.

125. The acts of wire fraud, mail fraud, securities fraud, and commercial bribery perpetrated by Southeast and the General Partners upon Murphy constituted a pattern of racketeering activity consisting of more than two acts of racketeering activity, all of which occurred after the effective date of 18 U.S.C. § 1961 et seq., and the last of which within ten years after the commission of a prior act of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

126. Southeast and the General Partners received income derived, directly or indirectly, from a pattern or racketeering activity in which each of them participated as a principal within the meaning of section 2, title 18, United States Code, and have used or invested, directly or indirectly, part of such income, or the proceeds of such income, in the acquisition of an interest in, or the establishment or operation of, each Enterprise, all in violation of 18 U.S.C. § 1962(a).

127. Southeast and the General Partners have through the pattern of racketeering activity referred to herein acquired or maintained an interest in or control of each Enterprise, in violation of 18 U.S.C. § 1962(b).

128. Southeast and the General Partners participated in the conduct of each Enterprise through the above-described

pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

129. Southeast and the General Partners agreed and conspired among themselves to violate 18 U.S.C. § 1962(a), (b) and (c), in violation of 18 U.S.C. § 1962(d).

130. The violations of Section 1962(a-d) of Title 18 of the United States Code have proximately caused Murphy great injury and harm in his business or property.

131. As a direct and proximate result of the foregoing violations of 18 U.S.C. § 1962 by Southeast and the General Partners, Murphy has been injured in his business and property in an amount equal to at least $3,050,000 (the promised 6.1 return on Murphy's $500,000 investment).

132. Additionally and/or alternatively, Southeast is liable for the violations of 18 U.S.C. § 1962(a-d) by either or both of the General Partners as a partner and joint venturer and under principles of vicarious, agency, co-conspirator, respondeat superior, and aider and abettor liability.

WHEREFORE, Murphy demands judgment against Southeast for treble damages in the amount of at least $9,150,000, interest, costs, attorney fees, and such other and further relief as the Court deems just and proper.

COUNT X

(NEGLIGENT MISREPRESENTATION)

133. Murphy repeats and realleges Paragraphs 1 through 132 above as if fully set forth herein and further states as follows.

134. Southeast knew or reasonably should have known, particularly in advance of the eve of the offering, of the requirement of its participants' awareness and approval of the proposed bond financing, and that the participants would not subordinate their liens to that created by the fond financing.

135. Southeast knew or should have known that Orchid would rely upon Southeast's failure to provide such material

information to Orchid in connection with Orchid's decision to undertake further loan obligations to Southeast and to expend additional resources.

136. Orchid did in fact reasonably rely upon Southeast's omissions.

137. As a result, Orchid has suffered millions of dollars in damages, and Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other further relief as the Court deems just and proper.

COUNT XI

NEGLIGENCE

138. Murphy repeats and realleges Paragraphs 1 through 137 above as if fully set forth herein.

139. Southeast owed a duty to Orchid and to Murphy to use reasonable care in all of Southeast's activities in connection with the Project, and to act reasonably in the administration of the community development bond offering.

140. Southeast breached its duty of reasonable care, and thereby has caused great injury and harm to Orchid and to Murphy.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other further relief as the Court deems just and proper.

BRUCE G. MURPHY
/s/
Bruce G. Murphy, pro se
265 Llwyd's Lane
Vero Beach, Florida 32963-3252
(561) 231-4202

D.C. DISTRICT COURT OPINION

829 F. Supp. 3

Bruce G. MURPHY, pro se, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORP., as Receiver for Southeast Bank, Defendant.

Civ. A. No. 92-1924 (CRR).

United States District Court,

District of Columbia.

Aug. 10, 1993.

Bruce G. Murphy, pro se.

Brendan Collins, Atty., U.S. Dept. of Justice, Civil Div., Washington, DC, together with Stuart E. Schiffer, Acting Asst. Atty. Gen., J. Ramsey Johnson, U.S. Atty. District of Columbia, John O. Birch, Asst. U.S. Atty., and J. Christopher Kohn, and Robert M. Hollis, U.S. Dept. of Justice, Civil Div., Washington, DC, for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The above-captioned case is before the Court on the Plaintiff's Motion for Summary Judgment on Counts I and II, the Defendant's Motion to Dismiss the entire action, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss. After careful review of the above motions, the oppositions and replies thereto, and the applicable law, the Court shall grant Summary Judgment for the Defendant.[1]

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[1] Because the Defendant's Motion to Dismiss relies on matters outside the pleadings, the Court shall treat the Motion as one for Summary Judgment. *See* Fed.R.Civ.P. 12(c).

I. BACKGROUND

The Plaintiff, Bruce Murphy, was a limited partner in Orchid Island Associates Limited Partnership ("Orchid"), a real estate developer financed by Southeast Bank, N.A. ("Southeast"). Southeast loaned Orchid approximately $50 million between 1988 and 1990.

According to the Complaint, Orchid was the developer of the Orchid Island Golf and Beach Club project near Vero Beach, Florida ("the Project"). In 1989, the Plaintiff invested $515,672.37 to become a limited partner in Orchid. When sales revenues slowed, a plan was devised whereby Orchid would hold a public bond offering to raise funds. Orchid was to take a "bridge" loan from Southeast, and other Orchid principals would take additional loans from Southeast, to carry the project until the bond offering was complete. The proceeds from the bond offering were intended to repay the bridge loan and decrease Orchid's outstanding debt with Southeast. When the participants learned that the bond financing would result in a lien on the project superior to theirs, they rejected the bond offering and the deal fell through. Orchid's financial position subsequently worsened, and Southeast placed Orchid in default on its loans and foreclosed on the Orchid mortgages.

The Plaintiff contends that Southeast, by its actions in connection with the Project, was a partner with Orchid and exercised control over the Project and the actions of Orchid. The Plaintiff contends that Southeast's actions resulted in harm to the Plaintiff's financial interest in the Project. On September 19, 1991, Southeast was declared insolvent and subject to Federal Deposit Insurance Corporation ("FDIC") receivership. On December 16, 1991, the Plaintiff filed a proof of claim with the FDIC for $602,031.54, an amount comprised of the initial investment, expenses, and attorney fees. On June 23, 1992, the FDIC disallowed the Plaintiff's claim stating that the FDIC was not liable for any alleged damages. The FDIC declined to grant an administrative

hearing to review this determination. On August 20, 1992, the Plaintiff brought suit in this Court against the FDIC as receiver for Southeast. The Plaintiff's Complaint alleges breach of fiduciary duties, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and an unlawful offer to sell securities.

The FDIC has moved to dismiss Counts III through IX of the Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e) bar these claims. More specifically, FDIC argues that the Plaintiff cannot sue Southeast under a joint venture theory, because all written documentation on the relationship between Orchid and Southeast explicitly rejects a joint venture relationship. The FDIC has also moved to dismiss the remaining Counts I and II, arguing that under 12 U.S.C. § 1821(d)(7)(A), the FDIC has discretion to determine when to establish administrative procedures to review claims, and that even if the FDIC is obligated to establish such procedures, they have discretion to determine which individual claimants are entitled to review. After careful review of the entire record in this action and the applicable law, the Court concludes that there are no material issues of fact in dispute that would preclude the entry of summary judgment for the Defendant.[2]

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[2] Summary judgment is awarded when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). It is well established that the Court must believe the non-movant's evidence and draw all justifiable inferences in his or her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed.2d 202 (1986). A factual dispute must be material in order to preclude summary judgment; that is, it must be a dispute that may affect the outcome of the suit under the governing law. *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510.

II. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON COUNTS V THROUGH IX BECAUSE THE PLAINTIFF CANNOT RECOVER AGAINST THE FDIC UNDER AN ALLEGED UNWRITTEN JOINT VENTURE AGREEMENT PURSUANT TO *D'OENCH, DUHME & COMPANY* V. *FDIC*, 315 U.S. 447 (1942), AND 12 U.S.C. § 1823(e).

In Counts V through IX, the Plaintiff alleges breach of fiduciary duty, breach of contract, fraudulent omissions and representations, and negligent misrepresentations by Southeast. The Court concludes that Summary Judgment must be granted for the Defendant on these five claims because the Plaintiff cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 and 12 U.S.C. § 1823(e).

The Plaintiff claims that Southeast and Orchid were partners in an unwritten joint venture agreement in connection with the Project. The crux of the Plaintiff's allegations is that Southeast acted in concert with Orchid in making decisions pertaining to the Orchid development that were separate and apart from Southeast's role as a mere lender to Orchid.[3]

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[3] For example, in Count V, the Plaintiff alleges that Southeast breached a fiduciary duty to the Plaintiff by failing to "exercise good faith, reasonable business judgment, and integrity in handling partnership affairs." Compl. at ¶ 40. In addition, in Count VI, the Plaintiff alleges that Orchid and Southeast were parties to an investment agreement with the Plaintiff in August, 1989, whereby the Plaintiff was to be paid an annual monetary sum. The Plaintiff further alleges breach of this contract by Southeast. *See* Compl. at ¶ 43. In Count VII, the Plaintiff alleges that Orchid breached its duty under the April 30, 1989 Accounting of the Second and Restated Limited Partnership, whereby Orchid was to furnish to each limited partner an annual audit report, a quarterly unaudited report, and an annual copy of the 1065 k-1 form. The Plaintiff seeks these documents for 1990 and 1991. However, this Count only refers to Orchid in connection with these reports and thus fails to state a claim against Southeast, and

However, such a claim is not cognizable under the law absent a written document. A party cannot rely on unrecorded agreements with a bank as the basis for claims or defenses against the FDIC. *D'Oench*, 315 U.S. 447, 62 S. Ct. 676; *Bowen* v. *FDIC*, 915 F.2d 1013 (5th Cir.1990); *see also Franklin Asaph Ltd.* v. *FDIC*, 794 F. Supp. 402 (D.D.C. 1992). Under *D'Oench*, transactions that do not appear on the bank's books are not cognizable in a court of law. *Bowen*, 915 F.2d at 1016. The policy underlying the *D'Oench* doctrine is "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench* 315 U.S. at 457, 62 S.Ct. at 679. While the original *D'Oench* case involved a party attempting to use an oral promise as a defense to a suit on a note issued by the FDIC, the modern *D'Oench* doctrine also applies when the FDIC is acting in its capacity as receiver, as is the case here. See *Bell & Murphy & Assoc., Inc.* v. *Interfirst Bank Gateway*, 894 F.2d 750, 753 (5th Cir.1990), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L.Ed.2d 203 (1990); *see also Bowen*, 915 F.2d at 1015.

In this case, there are no documents establishing the existence of a joint venture between Orchid and Southeast. Furthermore, the loan agreements here explicitly reject a joint venture between Southeast and Orchid. The first three loan agreements expressly provide that "[t]he Lender is a lender only and shall not be considered a shareholder, joint venturer

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therefore the FDIC, for breach fiduciary duty to provide these reports to the Plaintiff.

Finally, in Count VII and IX, the Plaintiff alleges that Southeast's failure to inform Orchid of the requirement that the participants approve the proposed bond offering constituted fraudulent omissions and representations and negligent misrepresentations. *See* Compl. at ¶ 47-50. The Plaintiff alleges that these omissions and representations induced Orchid to take an additional loan and expend other resources in anticipation of the bond offering.

or partner of the Borrower."[4] Furthermore, the final loan agreement on March 21, 1991, states that:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.

See Defendant's Motion to Dismiss at 6 (emphasis added).

The Plaintiff argues that his claims should not be barred because *D'Oench* only applies to a borrower of the bank who is trying to avoid an obligation. *See* Plaintiff's Opp'n at 4-5. He further contends that the *D'Oench* doctrine does not apply to certain tort claims that do not appear on the books of a failed bank. *Id.* at 3. The Court disagrees. The *D'Oench* doctrine acts as a bar where the Plaintiff is an investor, as well as when the Plaintiff is a borrower. *See In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1461-62 (D.D.C.1992). This is consistent with the logic of *D'Oench* which bars claims by any parties who, unlike depositors, were capable of protecting themselves through written agreements. Id.

Furthermore, "[t]orts and other claims which center around an unrecorded agreement are also barred, even though the plaintiff is not asserting the agreement itself explicitly against the FDIC." *In re NBW Commercial Paper Litigation*, 826 F.Supp. at 1465; *see also, FDIC* v. *State Bank of Virden*, 893 F.2d 139 (7th Cir.1990); *but see, Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-60 (8th Cir.1989). Thus, the claims here are exactly the type of claims which are barred by

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[4] This language was contained in the August 30, 1988 loan agreement, the April 13, 1989 loan agreement, and the January 31, 1990 loan agreement.

D'Oench.

In addition, the plain language of § 1823(e) bars this kind of claim.[5] Section 1823(e) provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988) (emphasis added).

Thus, the Plaintiff's claims under the alleged joint venture theory are barred. Accordingly, the Court shall grant Summary Judgment on Counts V through IX for the Defendant.

III. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE SECURITIES LAW CLAIMS BECAUSE THE PLAINTIFF HAS NOT STATED ANY INDEPENDENT BASIS FOR

[5] This section is "essentially a codification of *D'Oench*." *Bowen*, 915 F.2d at 1015. Whether the bar of *D'Oench* and section 1823 is coextensive has been debated, *see In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448 (D.D.C.1992) however, such an inquiry is not necessary in the instant case.

SOUTHEAST'S LIABILITY OTHER THAN AN ALLEGED UNWRITTEN AGREEMENT.

In Counts III and IV, the Plaintiff alleges securities law violations which he claims do not rely on a joint venture theory. In Count III the Plaintiff alleges that Orchid violated the registration requirement of the Virginia Securities Act § 13.1-507 by not registering the Orchid partnership units as securities. *See* Compl. at ¶ 35-36. Count IV alleges that the solicitation letter used by "[Orchid], the general partners, and [Southeast]" violated the "Unlawful Offers & Sales Provisions" of the Virginia Securities Act and the Florida Securities and Investor Protection Act. See Compl. at ¶ 38. Because the Plaintiff cannot point to any independent basis for liability against Southeast separate and apart from an alleged unwritten agreement, the Court shall also grant Summary Judgment for the Defendant on these claims.[6]

The Plaintiff argues that he can establish a degree of control by Southeast over the Project sufficient to satisfy § 13.1-522(B) even if he cannot establish the joint venture theory. *See* Plaintiff's Opp'n at 5-6. However, the Plaintiff cannot establish that Southeast was a "material participant" because, as set forth above, all of the written agreements between Orchid and Southeast explicitly reject the proposition that Southeast was anything more than simply a lender to Orchid. To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*. Courts have held

[6] In his Complaint, the Plaintiff does not even mention Southeast in the discussion of Count III, and thus on the face of the Complaint, the Plaintiff does not state any cause of action against Southeast. Not until his Opposition to the Defendant's Motion to Dismiss, does the Plaintiff allege that Southeast is also liable for this alleged violation under Va.Code Ann. § 13.1-522(B) which makes "material participants" in an unlawful sale also liable for any violations. However, even under the theory set forth in the Plaintiff's Opposition, this claim must fail because it is still barred by *D'Oench* and § 1823(e).

that *D'Oench* prohibits any claims based upon an unwritten agreement, even where the claims have been characterized as violations of securities laws. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1466-69; see also [sic] (citing *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir.1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 954, 112 L. Ed.2d 1042 (1991)).[7] Accordingly, the Court shall grant Summary Judgment on Count III for the Defendant.

Even assuming arguendo, that the Plaintiff once had a cognizable securities law claim not arising under a joint venture theory, the Plaintiff's claims would still be barred under § 13.1-522(D) which provides that "[n]o suit shall be maintained to enforce any liability created under this section [including § 13.1-502 and § 13.1-507] unless brought within two years after the transaction upon which it is based." Here the Plaintiff invested in Orchid in August of 1989. *See* Compl. at ¶ 19. However, the Plaintiff did not file the current action until August 20, 1992. *See* Compl. at 1. Thus, the Plaintiff's securities claims are barred under the plain language of the Virginia statute.

IV. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ADMINISTRATIVE CLAIMS BECAUSE, UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE FDIC HAS DISCRETION IN DETERMINING WHETHER TO ESTABLISH PROCEDURES TO REVIEW CLAIMS.

The Plaintiff also seeks declaratory relief and mandamus alleging that the FDIC did not provide the Plaintiff with an

[7] A claim for securities violations against the FDIC is cognizable when the act being sued on has no connection to an unwritten agreement but rather involves an independent basis for liability. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1467-68 (Claim for an unlawful sale of securities in violation of the Securities Act of 1933 not barred by *D'Oench*). However, no such independent basis for liability exists in this case.

administrative hearing or other alternative dispute resolution procedure pursuant to 12 U.S.C. § 1821(d)(7)(A) or 12 U.S.C. § 1821(d)(7)(B) to review the denial his claim. The Court finds however, that the FDIC has discretion in determining whether to establish review procedures, and thus the Court shall grant Summary Judgment for the Defendant on these claims.

The plain language of section 1821(d)(4) provides that the FDIC "may prescribe regulations ... providing for administrative determination of claims and review of such determination." (emphasis added). More specifically, an administrative hearing may be provided "if any claimant requests review ... and the [FDIC] agrees to such request ...." 12 U.S.C. § 1821(d)(7)(A) (emphasis added). Finally, the FDIC may provide other review procedures "as may be appropriate." 12 U.S.C. § 1821(d)(7)(B)(i). These provisions grant the FDIC discretion in determining whether to establish procedures to review claims. Furthermore, courts interpreting these sections have held similarly. *See FDIC* v. *Hanson*, 799 F. Supp. 954, 958 (D.Minn.1992) (FDIC has no obligation under § 1821(d)(4) to establish administrative procedures for the review of its denial of a claim); *see also, Mansolillo* v. *FDIC*, 804 F. Supp. 426, 430 (D.R.I.1992). Finally, even assuming arguendo, that the FDIC was required to establish such procedures, the statute still provides the FDIC with discretion to determine which particular claimants are entitled to review. *See* § 1821(d)(7)(A). Thus, because the Plaintiff is not entitled to an administrative review of his claim, the Court shall grant Summary Judgment on Counts I and II for the Defendant.

V. CONCLUSION

For all the reasons stated above, the Court concludes that the Plaintiff's claims are barred by the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e). Accordingly, the Court shall grant Summary Judgment for the Defendant.

Furthermore, the Court shall deny the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss as moot. The Court shall enter an Order of even date herewith in accordance with this Memorandum Opinion.

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, the Defendant's Motion to Dismiss, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss, the oppositions and replies thereto, the arguments of counsel, the record herein, the applicable law, and for the reasons articulated in this Court's Memorandum Opinion of even date herewith, it is, by the Court, this 10th day of August, 1993,

ORDERED that the Plaintiff's Partial Motion for Summary Judgment on Counts I and II shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment on Counts I through IX shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss is DENIED as moot; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

SOUTHERN DISTRICT OF FLORIDA OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 96-2614-CIV-MOORE

BRUCE G. MURPHY,

Plaintiff,

vs. **ORDER**

FILED BY (AM) D.C.
JUL 27 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

JEFFREY H. BECK, as Successor Agent for the Federal Deposit Insurance Corporation as Receiver for Southeast Bank, N.A.,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendant"s Motion to Dismiss (filed June 14, 1996 in United States District Court for the District of Columbia).

UPON CONSIDERATION of the motion, responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

In August 1989, Plaintiff Bruce Murphy ("Murphy") invested $515,672.37 to purchase a limited partnership interest in Orchid Island Associates Limited Partnership ("Orchid"). Orchid was formed to develop the Orchid Island Golf and

Beach Club Project (the "Project") for which Southeast Bank ("Southeast") was the lender. Pursuant to various loan agreements, Southeast loaned Orchid approximately $50 million dollars between 1988 and 1991. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in Federal Deposit Insurance Corporation ("FDIC") receivership. On May 11, 1998, this Court permitted Jeffrey Beck ("Beck"), as Successor Agent to the FDIC as Receiver for Southeast to be substituted as the party defendant in this action.

In this action, Murphy alleges that Southeast, by its actions in connection with the Project, was a joint venturer or de facto partner with Orchid and that Southeast controlled the project. Murphy alleges that Southeast's actions caused the loss of his investment. Murphy filed this action in August 1992 before the United States District Court for the District of Columbia alleging breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations. The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the doctrine of D'Oench, Duhme & Company v. FDIC, 315 U.S. 447 (1942), and, more specifically, that Murphy could not sue Southeast under a joint venture theory because all written documentation on the relationship between Orchid and Southeast explicitly rejected a joint venture relationship. On August 10, 1993, the United States District Court for the District of Columbia granted the FDIC's Motion to Dismiss. Murphy v. FDIC, 829 F. Supp. 3 (D.D.C. 1993). Citing the D'Oench doctrine, the court held that Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer in the Project because there was no written joint venture agreement. On appeal, the Court of Appeals for the D.C. Circuit reversed the majority of the district court's decision, holding that the D'Oench doctrine

was inapplicable. Murphy v. FDIC, 63 F.3d 34 (D.C. Cir. 1995).

On May 29, 1996, subsequent to the D.C. Circuit's decision, Murphy filed an Amended Complaint seeking declaratory relief (Count I), mandamus (Count II)[8] and alleging a failure to register securities (Count III), unlawful offer and sale of securities (Count IV), breach of fiduciary duty (Count V), breach of contract (Count VI), accounting irregularities (Count VII), fraud (Count VIII), RICO violations (Count IX), negligent misrepresentation (Count X) and negligence (Count XI).[9] Beck once again moves to dismiss the entire complaint, arguing the loan documents explicitly refute the existence of a joint venture agreement, or in the alternative, on various substantive grounds.

DISCUSSION

I. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court notes that it must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988), cert. denied sub nom. Peat Marwick Main & Co. v. Tew, 486 U.S. 1055 (1988). A court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no

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[8] FDIC was granted summary judgment on Counts I and II and thus these Counts are no longer before this Court. Murphy. FDIC, 61 F.3d 34 (D.C. Cir. 1995).

[9] By Order dated August 20, 1996, United States District Judge Charles R. Richey transferred this case to the Southern District of Florida. Judge Richey found that the plaintiff and vast majority of witnesses resided in this district. In addition, the failed land project is located in this district and Southeast Bank was originally located in Miami. Upon transfer, the case was assigned to this Court.

set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957) (citations omitted); South Florida Water Management Dist. v. Montaivo, 84 F.3d 402, 406 (11th Cir. 1996). Nonetheless, to withstand a motion to dismiss, it is axiomatic that the complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

II. Existence of a Joint Venture

Beck argues that because the alleged joint venture between Southeast and Orchid is evidenced by actions taken by Southeast, rather than by any written joint venture agreement, this action should be dismissed because the loan documents expressly disclaim the existence a joint venture. In this case, there are no documents creating a joint venture between Southeast and Orchid. Furthermore, the loan agreements at issue in this case expressly reject a joint venture between Southeast and Orchid. The first three loan agreements, dated August 30, 1998, April 13, 1989 and January 31, 1990, explicitly provide that "[t]he Lender [Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower [Orchid]." In addition, the final loan agreement, dated March 21, 1991, states:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having, acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project (emphasis added).

The plain language of the agreements is clear: No joint venture existed between Southeast and Orchid. See also FDIC v. Key Biscayne Develop. Assoc., 858 F.2d 670 (11th Cir. 1988) (observing that construction of a contract is a matter for the court to decide and expressly finding that agreements containing the language "It is understood and agreed that [Continental]. . . by issuing this loan or by taking any action pursuant hereto shall not be deemed a partner or joint venturer . . ." was clear evidence that the loan agreements did not create a joint venture).

Murphy does not dispute that the agreements contain express disclaimer language. Murphy argues, however, that he was not a party to any of the agreements containing the disclaimers and that "Florida law clearly permits a third party such as Murphy to establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." Murphy's argument is flawed for two reasons: First, Murphy is not a third party who was "not a party to the disclaimer agreement." Murphy, by virtue of his investment, was a limited partner in Orchid. Orchid is the signatory on each of the loan documents. Thus, as a limited partner in Orchid, Murphy is a party to, and bound by, the agreements. In addition, even were Murphy correct in arguing he was not a party to the agreements, there is still no evidence of a joint venture. Under Florida law, courts generally look at five elements to determine whether a joint venture exists: (1) community of interest in the performance of a common purpose; (2) joint control or right of control; (3) joint proprietary interest in the subject matter; (4) right to share in the profits; and (5) a duty to share in the losses. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957). A review of the loan agreements in this case fails to establish the existence of a joint venture, particularly because there is no evidence that Southeast had a right to share in any profits or any duty to share in any losses.

The Court further notes that the D'Oench doctrine prevents Murphy from stating a claim. As recognized by the United States District Court for the District of Columbia in ruling on the original motion to dismiss, Murphy's claim "is not cognizable under the law absent a written document . . .

and transactions that do not appear on the bank's books are not cognizable in a court of law." Murphy, 829 F. Supp. at 5-6. The District of Columbia Court of Appeals reversed, citing the Supreme Court decision in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) and expressly stating that the federal common law D'Oench doctrine has been displaced by federal statute. Murphy, 61 F. 3d at 36. In direct contrast to the D.C. Circuit, however, the Eleventh Circuit still adheres to the D'Oench doctrine. In Motorcity of Jacksonville Ltd. v. Southeast Bank, 83 F.3d 1317 (11th Cir. 1996), the Eleventh Circuit specifically "disagree[d] with Murphy's reliance on O'Melveny" and held that the federal common law D'Oench doctrine was not preempted. Id. at 1333-34. Accordingly, because the D'Oench doctrine is still valid in this circuit, the Court finds the district court's reasoning in Murphy persuasive that, in addition to the reasons stated above, the D'Oench doctrine prevents Murphy from stating a valid claim.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Beck's Motion to Dismiss is GRANTED. The Clerk of Court shall mark this case CLOSED. All motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of July, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Hilare Bass, Esq.
John F. Bloss, Esq.

ELEVENTH CIRCUIT OPINION

208 F.3d 959

Bruce G. MURPHY, Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Southeast Bank, N.A.; Jeffrey H. Beck, Defendants-Appellees.

No. 98-5292.

United States Court of Appeals,
Eleventh Circuit.
April 7, 2000.

John F. Bloss, Clark & Wharton, Greensboro, NC, for Plaintiff- Appellant.

Elliot H. Scherker, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and ALAIMO*, Senior District Judge.

MARCUS, Circuit Judge:

Plaintiff-Appellant Bruce G. Murphy ("Murphy") appeals the district court's order dismissing his amended complaint against Defendant Jeffrey Beck, as Successor Agent for the Federal Deposit Insurance Company, ("FDIC"). Among other things, the district court held that Murphy's claims

* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

against the FDIC were barred by the federal common law *D'Oench, Duhme* doctrine first expounded by the Supreme Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). Because acceptance of the *D'Oench, Duhme* doctrine is well-settled in this Circuit, and because we can discern no sound reason for not applying the doctrine in this case, we affirm the district court's order dismissing Murphy's complaint.

I.

The facts underlying this case are straightforward, but the procedural history of the case is both unusual and important. In June 1989, Murphy received a letter from Robert H. Haines, III, a general partner in Orchid Island Associates Limited Partnership ("Orchid"), soliciting Murphy's investment in Orchid's development of the Orchid Island Golf and Beach Club Project (the "Project") located in Indian County, Florida. The letter projected a 6.1 multiple return on investments. Soon thereafter, on August 18, 1989, Murphy invested $515,672.37 in a limited partnership interest in Orchid.

Southeast Bank provided several loans for the Project from the fall of 1988 until the beginning of 1991. These loans totaled approximately $50 million. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in FDIC receivership.

On August 20, 1992, Murphy filed suit in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast, alleging that Southeast asserted extensive control over the Project and that Southeast knew about and participated in the fraudulent activities of Orchid's principals. According to the complaint, Murphy was induced to invest by a solicitation letter from Orchid which falsely represented that projections by Arthur Anderson & Co. reflected a "6.1 multiple return on [ ][his] investment." Murphy claimed that Southeast acted in concert with Orchid

in making decisions pertaining to the Orchid development, and that these decisions were separate and apart from Southeast's role as a mere lender to Orchid. Murphy added that Southeast's actions as a joint venturer with Orchid in the Project caused the loss of his financial investment. Accordingly, Murphy sued for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the federal common law doctrine of *D'Oench, Duhme*. On August 10, 1993, the district court, treating the FDIC's motion as a motion for summary judgment, granted summary judgment on all counts. The district court ruled that under the *D'Oench, Duhme* doctrine, Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer with Orchid in the Project because there was no written joint venture agreement between the two. *Murphy* v. *FDIC*, 829 F. Supp. 3, 5-6 (D.D.C. 1993). In fact, the written agreements between the bank and Orchid denied such a relationship. *Id.* On appeal, the Court of Appeals for the D.C. Circuit reversed the district court's decision on all but two counts,[10] holding that the *D'Oench, Duhme* doctrine had been preempted by the Financial Institutions Reform, Recovery, and Enhancement Act

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[10] The Circuit Court affirmed the district court's grant of summary judgment in favor of the FDIC on Murphy's two procedural claims seeking 1) a declaratory judgment that the FDIC is required by statute to establish an ADR procedure, and 2) a writ of mandamus compelling that result. As for the first claim, the court held that although the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA) did not seem to require the FDIC to establish an ADR process, the FDIC appeared to have initiated such a program and therefore Murphy's request for the court to order the FDIC to do so was moot. As for the second claim, the court held that the FIRREA gave the FDIC discretion to decide whether to refer any particular case to ADR and therefore Murphy was not entitled to an order compelling the FDIC to direct his case to ADR. *Murphy*, 61 F.3d at 40-41.

of 1989 (FIRREA) and did not, therefore, bar Murphy's claims. *See Murphy* v. *FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995) (concluding that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one").

After remand to the district court, the FDIC again moved to dismiss the complaint for failure to state a claim. Without ruling on the motion, the district court transferred the case to the Southern District of Florida, concluding that the Southern District of Florida was a more convenient location for the case because the Plaintiff and the majority of witnesses resided in the district and both the Project and Southeast Bank had been located there. The district court for the Southern District of Florida substituted Jeffrey H. Beck as successor agent for the FDIC and, thereafter, granted the FDIC's Motion to Dismiss. The district court offered three alternative grounds for its decision: first, loan agreements between Orchid and Southeast disclaiming the existence of a joint venture barred Murphy, as a limited partner in Orchid and therefore a party to the agreements, from asserting such a joint venture; second, even if Murphy were not a party to the agreements, he failed to prove the existence of a joint venture relationship between Orchid and Southeast; and finally, the federal common law *D'Oench, Duhme* doctrine barred Murphy's claim.

II.

We review a district court's order granting a motion to dismiss for failure to state a claim de novo. *Beck* v. *Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *McKusick* v. *City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff. *Kirby* v. *Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999).

On appeal, we need only consider the district court's third reason for dismissal. Plainly, the *D'Oench, Duhme* doctrine was intended "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench, Duhme*, 315 U.S. at 457, 62 S. Ct. at 679, 86 L. Ed. 956. The doctrine originated more than half-a-century ago in the case of *D'Oench, Duhme & Co., Inc.* v. *FDIC* where a securities dealer who executed a demand note with a bank tried to prevent the FDIC, which had acquired the note, from enforcing it because of the dealer's separate agreement with the bank that the note would not be called for payment. The Supreme Court rejected the defense and squarely held that a secret agreement not on the bank's records could not operate as a defense against the FDIC's suit. *Id.* at 459, 62 S. Ct. at 680.[11]

The Eleventh Circuit has described the scope of the

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[11] Eight years later, Congress partially codified the holding of *D'Oench, Duhme*, as section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e)(1). This provision, as modified by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, currently provides:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

D'Oench, Duhme doctrine in these terms:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Baumann v. *Savers Federal Sav. and Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991). *See also Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317, 1326 (11th Cir. 1996) (*en banc*), *vacated and remanded by Hess* v. *FDIC*, 519 U.S. 1087, 117 S. Ct. 760, 136 L.Ed.2d 708 (1997), *reinstated by Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (11th Cir. 1997), (*en banc*), *cert. denied*, *Hess* v. *FDIC*, 523 U.S. 1093, 118 S. Ct. 1559, 140 L.Ed.2d 791 (1998).[12] We have held that the doctrine "'applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.'" *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 308 (11th Cir. 1993) (quoting *Baumann*, 934 F.2d at 1510). We have also made clear that the doctrine applies when the FDIC is acting as a receiver. *See FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989) (holding that the federal common law *D'Oench, Duhme* doctrine protects the FSLIC and the FDIC in both receiver and corporate capacities); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (*per curiam*) (citing

[12] The Supreme Court granted certiorari on *Motorcity I*, vacated our judgment, and remanded the case for further consideration in light of its decision in *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L.Ed.2d 656 (1997). In *Motorcity II*, after considering the Supreme Court's decision in *Atherton*, we reaffirmed our previous holding in *Motorcity I* and reinstated that opinion.

cases for the proposition that "courts have consistently applied the [*D'Oench, Duhme*] doctrine to those situations where the FDIC was acting in its capacity as receiver").

Because no written agreement exists between Southeast and Orchid, if the *D'Oench, Duhme* doctrine applies in this case, it bars Murphy's claims against the FDIC which are based on his allegations that Orchid and Southeast were acting as joint venturers. Murphy argues, however, that there are four independent reasons why the *D'Oench, Duhme* doctrine should not be applied in this case: first, the choice of law doctrine requires application of D.C. Circuit law rather than Eleventh Circuit law; second, the D.C. Circuit's decision that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA should be accepted as law of the case; third, the doctrine should not be applied to cases in which the receivership has generated a surplus; and finally, the doctrine is no longer valid in light of recent Supreme Court rulings. We are not persuaded by any of these arguments and address each in turn.

A.

We have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. In its consideration of this case before transfer, the D.C. Circuit held that the doctrine had been preempted by the FIRREA, and therefore could not bar Murphy's claims. *Murphy* v. *FDIC*, 61 F.3d at 38. According to the D.C. Circuit, "the Supreme Court ... necessarily decided the *D'Oench* question.... [T]he inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one." *Id.* at 39. In both *Motorcity I* and *Motorcity II*, we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See Motorcity I*, 83 F.3d at 1327 (noting that "[i]n *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995), the D.C. Circuit recently held that the Supreme Court's reasoning in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114

S. Ct. 2048, 129 L. Ed.2d 67 (1994), leads 'ineluctably' to the conclusion that the common law *D'Oench* doctrine has been preempted. *Id.* at 38.... We disagree ... and hold that the federal common law *D'Oench* doctrine has not been preempted by statute" (internal citations omitted)); *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit). In *Motorcity II* we concluded that "the analysis set forth in our prior *en banc* opinion [*Motorcity I*] reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at 1144.

Murphy argues nevertheless that we should apply the law of the D.C. Circuit rather than our own law to his claims because the law of the transferor court should govern in the context of transfers pursuant to 28 U.S.C. § 1404(a). Although this circuit has not addressed the question of whether a transferee court should follow its own interpretation of federal law or that of the transferor court, several other circuits have addressed the question, and all have concluded that the transferee court should apply its own interpretation of federal law. We find the reasoning of these circuits persuasive.

In *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), the D.C. Circuit addressed the question of what law to apply to a number of wrongful death actions that were transferred to the District of Columbia pursuant to 28 U.S.C. § 1407 for consolidated pretrial proceedings. The substantive issue before the court was whether the per-passenger damage limits set by the Warsaw Convention should be applied to limit Korean Air Lines' liability when the type size of the liability limit printed on the tickets

was smaller than the size required by the Montreal Agreement. The district court, interpreting District of Columbia law, held that the damage limits were applicable. *See In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985). This ruling was, however, contrary to precedent in the Second Circuit where several of the cases had originally been filed. *See In re Korean Air Lines Disaster*, 829 F.2d at 1172. The D.C. Circuit affirmed the district court's order squarely holding "that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit." *Id.* at 1173.

The court also distinguished *In re Korean Air Lines* from *Van Dusen* v. *Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L.Ed.2d 945 (1964), in which the Supreme Court held that when a defendant in a diversity action moves for a transfer of venue under 28 U.S.C. 1404(a), the state law that would have applied in the transferor court adheres to the case. *See Van Dusen*, 376 U.S. at 637-39, 84 S. Ct. at 820. The D.C. Circuit explained that the logic behind *Van Dusen* – reflecting the need to ensure that federal and state courts uniformly apply the same state law to diversity cases regardless of where the cases are tried – does not apply to a case brought under federal law because federal law is supposed to be unitary. *In re Korean Air Lines*, 829 F.2d at 1175-76. As the Circuit Court explained:

> Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.

Id. at 1175-76. The court concluded that "[t]he federal courts ... owe respect to each other's efforts and should strive to

avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *Id.* at 1176.

The Second, Eighth, and Ninth Circuits uniformly have agreed with the D.C. Circuit that in cases where federal law is at issue, transferee courts are obligated to follow their own interpretation of the relevant law. *See Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1171 n. 4 (8th Cir. 1998) (holding that the consolidated issues the court was hearing were controlled by the law of its circuit and not the law of the various circuits from which the cases were transferred); *Temporomandibular Joint (TMJ) Implant Recipients* v. *E.I. DuPont De Nemours & Co.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (holding that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton* v. *Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (same); *Menowitz* v. *Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (same).[13]

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[13] The Seventh Circuit has also agreed, in *dicta*, in the factually dissimilar case of *Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), with the reasoning of the D.C. Circuit. *Eckstein* involved a question of the appropriate statute of limitations for a claim of fraud arising under § 10(b) of the Securities Exchange Act of 1934. The case involved two sets of plaintiffs, both of whom filed their action before 1990. When the litigation began, federal courts throughout the country derived the periods of limitations in § 10(b) cases from state law. *See Eckstein*, 8 F.3d at 1124. However, in July 1990, the Seventh Circuit overruled its opinions that had looked to state law and held that § 13 of the Securities Act of 1933 supplied the proper statute of limitations for § 10(b) fraud claims. *See Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990). In June 1991, the Supreme Court agreed with the Seventh Circuit that the federal securities laws are the proper source of the period of limitations but selected § 9(e) of the Securities Exchange Act of 1934 as the most appropriate rule. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n. 9, 111 S. Ct. 2773, 2782 n. 9, 115 L. Ed.2d 321 (1991). Congress responded to *Lampf* by enacting stopgap legislation which provided that the proper period of limitations for cases filed on or before June 19, 1991, was the limitation period provided by the laws in the applicable jurisdiction as those law existed on June 19, 1991. *See Eckstein*, 8 F.3d at 1124 (quoting § 27A of the '34 Act, 15 U.S.C. § 78aa-1(a)). The district court in Eckstein held that under the stopgap legislation provided by § 27A, the law of the Seventh Circuit as stated in Short should control the statute of limitations imposed on both the plaintiffs who filed originally in the Seventh Circuit and those who filed originally in the Ninth Circuit. *See Majeski* v. *Balcor Entertainment Co. Ltd.*, 786 F. Supp. 1458, 1461 (E.D. Wis. 1992). On appeal, the Seventh Circuit faced the question of the proper application of § 27A to transferred cases. The Seventh Circuit agreed with the D.C. Circuit's reasoning in *In re Korean Air Lines* that a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal question. According to the court, "A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the questions independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Eckstein*, 8 F.3d at 1126. The court concluded, however, that Congress' stopgap legislation required a different result in this case. The Seventh Circuit held that § 27A required them to apply the statute of limitations of the Seventh Circuit to the plaintiffs who filed originally in Wisconsin and the statute of limitations of the Ninth Circuit to the plaintiffs who filed originally in California as those laws existed on June 19, 1991. *Id.* at 1127-28. Unlike in *Eckstein*, there is no Congressional mandate in the present case instructing us to depart from the usual rule that a court of appeals must apply its own interpretation of federal law.

We find the reasoning of the D.C., Second, Eighth, and Ninth Circuits persuasive. Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit. Therefore, we conclude that the law of the Eleventh Circuit, rather than the law of the D.C. Circuit, regarding the continued viability of the *D'Oench, Duhme* doctrine, was properly applied in this case.

B.

Second, Murphy argues that even if the law of the Eleventh Circuit should, in general, be applied to cases transferred

here, the previous holding of the D.C. Circuit in this case – that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA – binds this Court as "law of the case." "[L]aw of the case is an amorphous concept." *Arizona* v. *California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). The doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id*; *see also Robinson* v. *Parrish*, 720 F.2d 1548, 1549-50 (11th Cir. 1983). The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided. *See Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984); *United States* v. *Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984); *Robinson*, 720 F.2d at 1550. The law of the case doctrine does not, however, require rigid adherence to rulings made at an earlier stage of a case in all circumstances. *See Robinson*, 720 F.2d at 1550. The doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona*, 460 U.S. at 618, 103 S. Ct. 1382; *see also DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir. 1993) (noting that the doctrine "'is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice'") (quoting *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)). Both the Supreme Court and this Circuit have made clear that reconsideration of a prior holding is not improper if the court is convinced that the prior decision is clearly erroneous and would work manifest injustice. *See Arizona*, 460 U.S. at 619 n. 8, 103 S. Ct. at 1391 n. 8; *Wheeler*, 746 F.2d at 1440 (citing *United States* v. *Robinson*, 690 F.2d 869, 872 (11th Cir. 1982)). Such is the case here. We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine. We are not, therefore, bound by the "law of the case" doctrine to adhere to a ruling with which we have emphatically and repeatedly disagreed.

C.

Third, Murphy argues that even under current Eleventh Circuit law the *D'Oench, Duhme* doctrine should not be applied in this particular case because, Southeast, unlike the vast majority of FDIC receiverships, generated a $150 million surplus. Murphy suggests that because, under 12 U.S.C. § 1821(d)(11)(B), the bank's shareholders are allowed to divide funds remaining in a receivership pool after the creditors have been paid in full, applying the *D'Oench, Duhme* doctrine in this case would unfairly allow Southeast's shareholders to benefit from Murphy's loss. Murphy contends that allowing the bank's shareholders to divide what remains of his lost investment is contrary to notions of equity.

Murphy can point us to no case law, however, saying or even suggesting that the *D'Oench, Duhme* doctrine does not apply in cases where the receivership has generated a surplus. Rather, Murphy cites cases favoring the use of corporate assets to discharge debts before corporate stockholders are paid. *See Bankers Trust Co.* v. *Florida East Coast Ry. Co.*, 31 F. Supp. 961, 964 (S.D. Fla. 1940) (ordering preferential payment by receivers of defendant railroad of previously entered judgment awarding plaintiff damages for the wrongful death of her husband); *Hoyt* v. *Hampe*, 206 Iowa 206, 214 N.W. 718, 719 (1927) (explaining that "[t]he stockholders of a corporation are not entitled to a distribution of the assets among themselves while corporate debts remain unpaid"). Neither of these cases involve the FDIC as a party, and they do not implicate or shed light on the applicability of the *D'Oench, Duhme* doctrine in cases of surplus.[14]

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[14] The third case Murphy cites in support of his surplus argument, *First Interstate Bank of Texas, N.A.* v. *First National Bank of Jefferson*, 928 F.2d 153 (5th Cir. 1991), also does not involve the *D'Oench, Duhme* doctrine and merely underscores the inapplicability of these cases to the question at hand. In *First Interstate Bank* the court expressly states that "[t]he *D'Oench, Duhme* doctrine protects the FDIC, not a solvent bank.

As we explained in *Motorcity I*, the purpose of the *D'Oench, Duhme* doctrine is to ensure that the FDIC can rely on the records of a failed bank to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits. *Motorcity I*, 83 F.3d at 1324. "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Motorcity I*, 83 F.3d at 1325. Permitting the doctrine to be overridden if a receivership generates a surplus in the future undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses. Indeed the rationale of *D'Oench, Duhme* – to protect the FDIC from enforcement of oral agreements against failed financial institutions – is no less compelling if the failed institution eventually generates a surplus. The exception Murphy favors would eviscerate the doctrine. We conclude, therefore, that neither precedent nor the doctrine's purpose counsel in favor of creating an exception to the application of the *D'Oench, Duhme* doctrine for cases in which a receivership generates a surplus.

D.

Finally, Murphy argues that the *D'Oench, Duhme* doctrine is no longer good law because it has been supplanted by the FIRREA. Murphy argues that the Supreme Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L.Ed.2d 67 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed.2d 656 (1997), require such preemption. Our Circuit has already spoken clearly on this issue rejecting precisely this claim.

In *O'Melveny & Myers*, the FDIC, as receiver of a failed

The district court correctly declined to extend the doctrine to this case in which the FDIC is not a party." *Id.*, 928 F.2d at 156.

California savings and loan (S&L), brought a malpractice lawsuit against the savings and loan's former law firm, pleading causes of action under California law for professional negligence and breach of fiduciary duty. *Id.*, 512 U.S. at 82, 114 S. Ct. at 2052. The FDIC alleged that the law firm failed to inform the S&L of the illegal acts of the S&L's controlling officers. *Id.* The law firm defended by arguing that, under California law, knowledge of the conduct of the S&L's controlling officers must be imputed to the S&L, and hence to the FDIC, which, as receiver, stood in the S&L's shoes. Id. The FDIC urged the Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. *Id.* at 83, 114 S. Ct. at 2052. The Court declined to do so. First, the Court explained that, by statute, California, rather than federal common law, governed imputation of corporate officers' knowledge to the FDIC. The Supreme Court noted that 12 U.S.C. § 1821(d)(2)(A)(i), as amended by the FIRREA, "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*, at 87, 114 S. Ct. at 2054. Moreover, the Court explained that even if the FIRREA was not applicable in the present case this was not a case "in which judicial creation of a special federal rule would be justified." *Id.* at 87, 114 S. Ct. at 2055.[15]

In *Atherton*, the Resolution Trust Corporation (later replaced by the FDIC) sued several officers and directors of the failed City Federal Savings Bank claiming that they had violated the legal standard of care they owed that federally insured institution. *Id.*, 519 U.S. at 215, 117 S. Ct. at 668. The

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[15] The Court explained that the creation of federal common law was justified only in those limited situations where "there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054 (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L.Ed.2d 369 (1966)).

Supreme Court addressed the question of where courts should look to find the standard of care against which to measure the legal propriety of the defendants' conduct – to state law, to federal common law, or to a provision of the FIRREA, 12 U.S.C. § 1821(k). *Id.* at 215-216, 117 S. Ct. at 669. The district court had held that the federal statute, § 1821, provided the appropriate standard of care. *Id.* at 216, 117 S.Ct. at 669. The Court of Appeals for the Third Circuit reversed holding that the federal statute provided only a baseline level of care but did not prohibit actions resting upon stricter rules originating in either state law or in federal common law. *Id.* at 217, 117 S. Ct. at 669. The Supreme Court vacated the Third Circuit opinion. As an initial matter the Court held that the federal common law corporate governance standards articulated by the Court in *Briggs* v. *Spaulding*, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891), did not survive the Court's later decision in *Erie R. Co.* v. *Tompkins*. *Id.*, at 226, 117 S. Ct. at 674. As a result, the Court made clear: "There is no federal common law that would create a general standard of care applicable to this case." *Id.* The Court then went on to consider whether federal statute, 12 U.S.C. § 1821, or state law provided the appropriate standard of care in the case. The Supreme Court held that the federal statute's "gross negligence" standard provided a floor, but did not stand in the way of a stricter state-law standard making directors and officers liable for less egregious conduct. *Id.* at 227, 117 S. Ct. at 674.

In *Motorcity I* and *Motorcity II* we ruled decisively and en banc that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doc-

trine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the D'Oench, Duhme doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit:

> [W]e decline to accept *Motorcity's* invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States* v. *Texas*,[16] and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Id., 120 F.3d 1140, 1144. This panel is bound by the Circuit's prior *en banc* decision. *See Chambers* v. *Thompson*, 150 F.3d 1324, 1326 (11th Cir.1998) (noting that "[w]e are bound to follow a prior panel or *en banc* holding, except where that holding has been overruled or undermined to the

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[16] In *United States* v. *Texas*, 507 U.S. 529, 113 S. Ct. 1631, 123 L. Ed.2d 245 (1993), the Supreme Court noted the "longstanding ... principle that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* 507 U.S. at 534, 113 S. Ct. 1631 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952)). The Court held that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L. Ed.2d 581 (1978); *Milwaukee* v. *Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791, 68 L. Ed.2d 114 (1981)).

point of abrogation by a subsequent *en banc* or Supreme Court decision").

Therefore, under the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint.[17]

AFFIRMED.

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[17] In view of this ruling, we need not address the district court's alternative grounds for dismissal.